SUPREME COURT U. S.

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No. 285

# In the Supreme Court of the United States

OCTOBER TERM, 1961

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KENDALL H. SHOYER and AGNES P. SHOYER,
PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The memorandum and order of the district court (R. 18a-19a)[1] are not officially reported. The opinion of the court of appeals (Pet. 16-17) is reported at 290 F. 2d 817.

### JURISDICTION

The judgment of the Court of Appeals was entered on May 16, 1961 (Pet. 18). The petition for a writ

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[1] Record references are to the appendix to the appellants' brief in the Court of Appeals.

of certiorari was filed on August 4, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether expenses incurred by a judge in connection with his successful campaign for election to judicial office, the major portion of which were contributions to a political party's campaign fund, are deductible for federal income tax purposes.

## STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) [As amended by Sec. 121(a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Expenses.*—

(1) *Trade or business expenses.*—

(A) *In General.* — All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; * * *.

* * * *

(2) *Non-trade or non-business expenses.* —In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the

management, conservation, or maintenance of property held for the production of income.

* * * *

(26 U.S.C. 1952 ed., Sec. 23(a).)

SEC. 48. DEFINITIONS.

When used in this chapter—

* * * *

(d) *Trade or Business.*—The term "trade or business" includes the performance of the functions of a public office.

(26 U.S.C. 1952 ed., Sec. 48(d).)

Treasury Regulations 118 (1939 Code):

SEC. 39.23(a)-15 *Nontrade or nonbusiness expenses.* * * *

* * * *

(f) Among expenditures not allowable under section 23(a)(2) are the following: * * * campaign expenses of a candidate for public office, * * *.

* * * *

## STATEMENT

The taxpayer, petitioner Kendall H. Shoyer,[2] was appointed by the Governor of Pennsylvania as a judge of the Orphans' Court of Philadelphia County, Pennsylvania, on July 1, 1952, for the remainder of a term expiring on January 4, 1954 (R. 2a, 15a). In November 1953, he was elected a judge of that court for a full ten-year term beginning January 5, 1954 (R. 2a-

[2] The other petitioner, taxpayer's wife, is a party only because she and her husband filed a joint return.

3a, 17a). In connection with his election campaign for that office, the taxpayer incurred expenses of $1,347.64, of which approximately $1,200 constituted contributions to a political party, and the balance such items as filing fees, messenger service and printing (R. 10a-13a, 16a-17a). In their joint federal income tax return for 1953, the taxpayer and his wife claimed a deduction for these campaign expenses (R. 3a, 9a, 17a). The District Director disallowed the deduction on the ground that campaign expenses were not deductible, and assessed a deficiency (R. 3a, 9a). The taxpayer paid the deficiency and filed suit for refund (*ibid.*).

Both the government and the taxpayer moved for summary judgment (R. 14a-18a). The district court granted the government's motion and denied that of the taxpayer (R. 18a-19a). The court of appeals affirmed, *per curiam*, on the authority of *McDonald* v. *Commissioner*, 323 U.S. 57 (Pet. 16-17).

## ARGUMENT

1. The court below correctly held that the taxpayer's expenses incurred in connection with his successful campaign for election as a judge were not deductible either as ordinary and necessary business expenses under Section 23(a)(1)(A) of the 1939 Code, or as ordinary and necessary expenses for the production of income under Section 23(a)(2) of the Code. As the court below ruled, this issue is controlled by *McDonald* v. *Commissioner*, 323 U.S. 57.

The taxpayer in *McDonald* had been appointed to serve the unexpired term of a state court judgeship, on the understanding that he would be a candidate

for a full term in the next general election. In order to obtain the support of his political party in such election, however, he was required to pay an assessment made by the party. He also incurred other campaign expenses such as advertising, printing, travel, etc. His election campaign was unsuccessful. This Court, upholding the decision of the Tax Court, held that his campaign expenses were properly disallowed.

While there was no opinion of the Court in the *McDonald* case, the opinion of Mr. Justice Frankfurter (in which Mr. Chief Justice Stone, Mr. Justice Roberts and Mr. Justice Jackson concurred [3]) cogently explained why the campaign expenses were not deductible. They were not deductible under Section 23 (a) (1) (A) as ordinary and necessary business expenses because, although the taxpayer could "deduct all expenses that related to the discharge of his functions as a judge," "his campaign contributions were not expenses incurred in being a judge but in trying to be a judge for the next ten years" (p. 60). They were not deductible under Section 23(a) (2) as expenses for the production of income, since the latter provision (adopted by a 1942 amendment to the Code) was designed to permit the deduction of expenses of "profitable transactions not covered by the statutory concept of 'business' income. But of course earnings from 'the performance of the functions of a public office' had specifically been so covered. * * * [t]he diffi-

[3] Mr. Justice Rutledge concurred in the result. Mr. Justice Black dissented, in an opinion in which Mr. Justice Reed, Mr. Justice Douglas and Mr. Justice Murphy joined.

culty is not that petitioner's expenditures related to 'non-business' income, and thus were excluded from the legislative scheme before the 1942 Amendment, but that they were not incurred in 'carrying on' his 'business' of judging. * * * [T]he act of 1942 in no wise affected the disallowance of campaign expenses as consistently reflected by legislative history, court decision, Treasury practice and Treasury regulations" (p. 62).

Since the *McDonald* case, Congress has given no indication that it disagreed with, or wished to change, the rule that political campaign expenses are not deductible. On the contrary, Congress in 1954 reenacted, in substantially the same form as in the 1939 Code involved in *McDonald*, the provisions governing the deduction of business and income-producing expenses. Internal Revenue Code of 1954, Sections 162 (a), 212(1). Furthermore, the Treasury Regulations have continued to provide, as they have done for many years, that "campaign expenses of a candidate for public office" are not deductible.—Treasury Regulations 118 (1939 Code), Section 39.23(a)-15, *supra*, p. 3; Treasury Regulations on Income Taxes (1954 Code), Section 1.212-1(f).

The cases since *McDonald* that have considered the issue have uniformly held campaign expenses not deductible. In *Mays* v. *Bowers*, 201 F. 2d 401 (C.A. 4), certiorari denied, 345 U.S. 969, the court upheld the disallowance of the expenses of a successful campaign for election to a county council. In an opinion by Chief Judge Parker, which relied upon *McDonald*, the court stated (p. 403):

> The salary of an office is paid for the performance of the duties of the office. Expenses incurred in such performance are proper deductions from income, but not expenses incurred in campaigning for the office. Expenses of barbecues, party campaign contributions, hiring of automobiles and pay of poll workers are certainly not expenses incurred in earning the salary of the office. If such deductions should be allowed, the government to the extent of the reduction in taxes thereby obtained would be paying the campaign expenses of the taxpayer, and would be paying a larger portion in the case of a wealthy taxpayer in the high income brackets than of a poor taxpayer in the lower brackets. In cases where the expenses of the campaign equalled or exceeded the salary of the office, which has been known to occur, the taxpayer would pay no tax upon his salary at all. Not until Congress unequivocally allows deductions which are fraught with the possibility of such absurd consequences should the courts sanction them.

In *Harry D. Morcland*, ¶ 60,178 P-H Memo TC, the Tax Court last year upheld the disallowance of the expenses of an unsuccessful campaign for election to Congress.

The petitioners urge (Pet. 10-14), however, that the rationale of *McDonald* was that, under the rule of *Dobson* v. *Commissioner*, 320 U.S. 489, this Court merely refused to disturb the decision of the Tax Court; and that in view of the 1948 Amendment to the Code which overturned the *Dobson* rule (62 Stat. 991, 26 U.S.C. 1952 ed., 1141(a)), the *McDonald*

decision is no longer controlling. But the reliance in *McDonald* upon the *Dobson* rule was merely an additional basis for the conclusion that the campaign expenses were not deductible; the primary reliance was on the stautory provisions. The 1948 change in the *Dobson* principle cast no doubt upon the reasoning in Mr. Justice Frankfurter's opinion which showed that campaign expenses are neither ordinary and necessary business expenses nor ordinary and necessary expenses for the production of income.

In these circumstances, there is no occasion for this Court to reexamine *McDonald*, as the taxpayer suggests (Pet. 12). He points to no new circumstances or changed conditions that throw any doubt upon its correctness. If any change is to be made in the settled rule that campaign expenses are not deductible, that is a matter for Congress rather than for this Court.

2. The petitioners also contend (Pet. 7-9) that the district court improperly granted the government's motion for summary judgment because there was an issue as to a material fact, namely, "whether the expenses deducted by Judge Shoyer were incurred in the performance of one of the functions of his office" (Pet. 8). They argue that, since a referendum taken by the Philadelphia Bar Association prior to the 1953 election showed that a majority of those voting believed that the taxpayer was qualified to continue as a judge of the Orphans' Court (R. 12a-13a), he then had a "duty to seek election" (Pet. 5). But the taxpayer's belief that he had a moral duty to run for office did not change the character of his

campaign expenses. The taxpayer admitted (R. 12a) that all of those expenses were incurred as a candidate for election. As a matter of law, therefore, the expenses were not deductible; and the claim that the taxpayer had a duty to run for the office did not raise any material factual issue that precluded the grant of summary judgment.

## CONCLUSION

The decision of the court of appeals is correct and is in accord with the controlling decision of this Court and the decisions of the lower courts. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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